85-1522

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1985

COAD MILLER, individually and on behalf of himself, and in a representative capacity on behalf of a class of persons similarly situated,

Petitioner,

-vs-

CITY OF CHICAGO, a municipal corporation, and JOHN DOES, One through Five, employees, agents and towing contractors,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a Chicago Ordinance and a local police rule violate the due process clause of the 14th Amendment by providing: that victims of auto theft be required to pay for police services in towing and storing their vehicles after they are recovered;

- Where the ordinance requires the police to tow the vehicle to a pound, as is done where the owner is a traffic violator;

- Where the police do not charge for the transport or storage of other recovered property;

- Where no such charges are imposed in other cities;[1] and

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[1]Plaintiff disavowed the grounds
(Footnote Continued)

- Where provisions for a hearing after notice do not permit relief from such charges by proof that the

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(Footnote Continued)
for relief relied upon by the district court which was lack of prior notice before towing.

Plaintiff does not deny that the police may tow vehicles from hazardous or traffic interference.

He challenges the right of the police, however, to charge for such services, or for towing even legally parked recoverd stolen cars to police pounds.

Plaintiff also disavowed the dichotomy imposed on the plaintiff class by the trial court which included owners of vehicles left by the thief legally parked, but excluded those vehicles thieves left illegally or hazardously parked. The owner was faultless in either case, and there is no respondeat superior doctrine between thief and victims. The City has the right to tow illegally parked vehicles - as part of its general police work. But it has no right to charge the victim of a theft for its work.

vehicle owner was a victim of a crime without fault; and

2. Is the sua sponte rationalization of the Court of Appeals of charges for police work on grounds that they are covered by insurance itself a violation of the due process clause; and

3. Is the local legislative scheme, as well as the rationalization of the Court of Appeals so aberrational as to be a departure from accepted understanding of basic constitutional rights and principles as to require the imposition by this Court of its supervisory power for remedial action.

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COAD MILLER, individually and on behalf of himself, and in a representative capacity on behalf of a class of persons similarly situated,

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-vs-

CITY OF CHICAGO, a municipal corporation, and JOHN DOES, One through Five, employees, agents and towing contractors,

Respondents.

Merit Insurance Co., Heritage Insurance Co, Prestige Casualty Co., Reliable Insurance Co., Delta Casualty Co., and Coronet Insurance Co. were intervenors in the trial court, but did not take an active part in the appeal.

Alliance Of American Insurers, American Insurance Association, National Association of Independent Insurers, National Automobile Theft Bureau, Inc., and State Farm Mutual Automobile Insurance Company were amicus curiae in both the trial court and the appellate court.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PRAYER FOR RELIEF

Petitioner respectfully prays that a writ of certiorari issue to review to the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 24, 1985; rehearing was denied on November 18, 1985.

OPINIONS BELOW

The decision of the district court entered on November 22, 1983 was not reported. It was modified on May 25, 1984, and its final judgment order was entered on August 22, 1984 (Appendix A-1, A-2 and A-3).

The Opinion of the Court of Appeals is reported at 774 F.2d 188 (7th Cir. 1985) (hereinafter cited as

"Miller"). A copy is set out in Appendix B.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on September 24, 1985, Appendix C-1, and a timely petition for rehearing and rehearing en banc was denied on November 18, 1985, Appendix C-2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Jurisdiction was invoked under 42 U.S.C. §1983.

Plaintiff claimed violation of the due process clause of the 14th Amendment.

Plaintiff challenged the validity of:

Municipal Code of Chicago §27-367

Chicago Police Department
General Order 75-5

Each is set out in full in Appendix D.

STATEMENT OF THE CASE

Plaintiff does not deny that the police have the authority to tow vehicles which are blocking traffic, found in hazardous circumstances - or even found legally parked - after having been left by the thief.[1]

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[1] See Glassbrook Brothers v. Glamorgan County Council, [1925] AC 270, 12 BRC 1091 for the common law roots and application of this doctrine, and special circumstances for unique exception where standard services rejected and special services negotiated.

Plaintiff disavowed the grounds of the district court's ruling of lack of pre-tow notice, a requirement which makes sense before towing abandoned vehicles, Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir. 1982); Stypman v. City of San

(Footnote Continued)

Plaintiff challenges the Ordinance and Police Rule involved which require fees to be charged for such police work. Alternatively, plaintiff asks that these local provisions be struck down in that they require the police to tow the vehicle, and do not permit the police to return the recovered vehicle directly to the owner, without towing (as is done in other cities - Milwaukee, Seattle, Philadelphia, which fact plaintiff presented to the Court of Appeals).

(Footnote Continued)
Francisco, 557 F.2d 1338 (9th Cir. 1977).

Distinguish Mays v. Scranton City Police Dept.,503 F.Supp. 1255, 1261 (M.D. Pa. 1980), Gilliam v. Landrieu, 445 F.Supp. 1030 (E.D.La. 1978), cases upholding the power to tow and assess chargs where the vehicle owner is a miscreant, not a victim.

Plaintiff, a victim of auto theft, who paid the charges for towing and storage of his recovered vehicle, also challenges the provisions of the Ordinance and Police Rule which provide for a hearing, after notice, but which do not permit relief from the charges to auto theft victims who may prove lack of fault. This is a mockery of due process.[2]

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[2]Because in the trial court the City repeatedly argued that the auto theft victims were entitled to a hearing, plaintiff presented this "script" of such a hearing, to try to make the point that no relief was available at such a hearing:

> HEARING OFFICER: Have you paid the required $25.00 fee in order to get a hearing?
>
> VEHICLE OWNER: Yes, sir. And I made a trip to the pound to pay it, and I did without my car for an extra day to wait for the hearing.

(Footnote Continued)

REASONS WHY REVIEW SHOULD BE GRANTED

The Court of Appeals does not deny that the police are charging for

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(Footnote Continued)

> HEARING OFFICER: And what is your defense to the towing and storage charges?
>
> VEHICLE OWNER: My car was stolen. The police recovered it. Here is the police report that shows this and the stolen vehicle report that includes my telephone number and address. But even though there was no emergency, the police did not contact me, or give me any change to pick up the car. Instead they had it towed to the pound, and demanded $45 for towing and $5.00 a day for storage.
>
> HEARING OFFICER: And well they should under General Order 75-5 and Ordinances 27-360(1)-8, 26-367, 27-372 and 27-423-429.1. So your defense is rejected. If you had not asked for a hearing you could have paid your money and got your car yesterday. That will be $5.00 more for an extra day of storage.

police services under the Ordinance and Police Rule. The Court (Miller, 774 F.2d at 195-96) recognizes the impropriety of such action, even though it disparges as "near turn of the century" plaintiff's citations of authority which were unchallenged.

The Court of Appeals rationalized upholding the practice on the ground that while "it may be unfortunate that the defendant's procedures require vehicle owners to 'ante up' to recover their stolen vehicles", the owners will be "reimbursed under standard insurance policies." (Miller, 774 F.2d at 195), as though vehicle owners were not required to pay for such insurance coverage. This is a "taking" under the 14th Amendment.

The sua sponte rationalization of the Court of Appeals that these charges are paid for by insurance, aside from being totally unsupported (the figures were taken from unsupported statements in an amicus brief filed on behalf of the insurance industry) clashes with accepted understanding of constitutional rights and principles. That rationalization does not justify a hearing procedure more Kafkian than constitutional which provides for hearing after notice, but which does not permit relief from such charges even upon proof that the vehicle owner is a victim - without fault - and not a miscreant.

The ruling of the Court of Appeals calls out for the imposition of this Court of its supervisory power

to avoid an erosion of accepted constitutional rights and protections under the 14th Amendment.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted.

February 18, 1986

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APPENDIX

APPENDIX A

1. Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, Entered November 18, 1983 (Hart, J.)

2. Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, Entered May 25, 1984 (Hart, J.)

3. Judgment Order, United States District Court for the Northern District of Illinois, Eastern Division, Entered August 22, 1984 (Hart, J.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COAD MILLER, individually, on behalf of himself and in a representative capacity on behalf of a class on behalf of a class of persons similarly situated)	
Plaintiff,	
-vs-	No.82C1607
CITY OF CHICAGO, a municipal corporation, and John Does One through Five, employees, agents and towing contractors,	
Defendants.	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on cross motions for summary judgment. The facts underlying this action are not disputed; the sole issue to be decided being the constitutionality of portions of Chicago Police Department General Order 75-5. For

the reasons outlined below, the City of Chicago's (the "City") motion for summary judgment is denied, and plaintiff's motion for summary judgment is granted.

General Order 75-5 mandates the immediate towing of, among other classes of vehicles, any vehicle reported as stolen which is later recovered by the police.[1] To claim the recovered vehicle, the owner must

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[1] Relevant excerpts of General Order 75-5 are attached as Appendix A. All references in this opinion to "General Order 75-5" as it concerns towing of recovered stolen vehicles should be understood to refer specifically to paragraph III(A)(10) of the Order. Miller does not contest the constitutionality of paragraph III(A)(1)-(9) of General Order 75-5. Those provisions apply to vehicles posing a hazard to traffic or the safety of the community.

then pay towing and storage charges. Pursuant to Municipal Code §27-367, the owner may request a hearing to determine the validity of the tow, either (i) before payment of charges, within 24 hours; or (ii) after payment of charges and a $25.00 deposit, within seven days.

Coad Miller ("Miller"), the plaintiff, claims to be the victim of an auto theft. He reported his Volkswagen stolen on November 12, 1981. The Volkswagen was recovered on November 17, 1981 and towed to the City Auto Pound. He was then notified by mail that his car had been recovered. Miller paid the towing and storage charges to obtain the release of his auto, without requesting a hearing. Rather, Miller has

brought a class action under 42 U.S.C. §1983. He charges that General Order 75-5, by requiring payment of fees by the owner to obtain release of an auto towed without notice to the owner or a violation of the law, violates the due process clause of the 14th Amendment.

Jurisdiction over this claim is properly asserted pursuant to 28 U.S.C. §1331. Venue properly lies in this district for this non-diversity action, since the defendant is located in the district and the claim arose within the district.

Class Certification

Prior to dealing with the merits of plaintiff's claim, Miller's motion for class certification must be addressed. Jimenez v. Weinberger,

523 F.2d 689, 697-98 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Peritz v. Liberty Loan Corp., 523 F.2d 349, 353-54 (7th Cir. 1975).

The four requirements of Fed.R. Civ.P. 23(a) are all met. The undisputed facts show that over 25,000 stolen autos were recovered within the City of Chicago during 1980. A class of the owners or lienholders of recovered autos for that year alone, much less a class covering several years,[2] would be "so numerous that joinder of all members would be impracticable." Rule 23(a)(1). The

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[2] By virtue of the applicable five year statute of limitations, the class would include owners of all vehicles towed since March 15, 1977, a period of over six years.

sole question in this case is the constitutionality of the existing City policy mandating the immediate towing of recovered stolen vehicles. This question of law is "common to the class." Rule 23(a) (2). The plaintiff's claim of deprivation of property without due process and defendant's response, that the existing hearing process comports with due process requirements, are "typical of the claims" of and defenses raised against the class. Rule 23(a)(3). Finally, Miller has retained competent counsel, who has vigorously prosecuted his claim. There is no suggestion that Miller has interests antagonistic to those of the class, so that he would not adequately protect the interests of

the class he represents. Rule 23(a)(4).

The requirements of Rule 23(b) are also met. Miller has requested certification under Fed.R.Civ.P. 23(b)(1) and 23(b)(3). In addition, this Court has authority to consider, sua sponte, class certification under Rule 23(b)(2). Senter v. General Motors Corp., 532 F.2d 511, 520-22 (6th Cir.), cert. denied, 429 U.S. 870 (1976); Garrett v. City of Hamtramck, 503 F.2d 1236, 1243-44 (6th Cir. 1974). The Court is of the opinion that certification is most proper under Rule 23(b)(2). The City of Chicago "has acted on grounds generally applicable to the class" by following Police Department General Order 75-5. Rule 23(b)(2). Class

actions challenging similar towing ordinances have all been certified under Rule 23(b)(2). See, e.g., Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir. 1982); Graff v. Nicholl, 370 F.Supp. 974 (N.D.Ill. 1974); Tedeschi v. Blackwood, 410 F.Supp. 34 (D.Conn. 1976); Kalodimos v. City of Chicago, No. 78 C 5012 (N.D.Ill. 1983).

That plaintiff requests compensatory relief, as well as a declaration that General Order 75-5 is unconstitutional, does not preclude certification under Rule 23(b)(2). The compensatory relief Miller seeks would be equitable relief, in the form of restitution. Such relief would be proper for a Rule 23(b)(2) class as incidental to the primary

relief sought. Edmondson v. Simon, 86 F.R.D. 375, 383 (N.D.Ill. 1980); Research Corp. v. Pfister Associated Growers, Inc., 301 F.Supp. 497 (N.D.Ill. 1969).

Certification under Rule 23(b)(2) renders unnecessary any discussion of the requirements of Rule 23(b)(1) and (b)(3).[3] However,

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[3]However, the Court notes that the plaintiff class qualifies for certification under both provisions. The common questions of law predominate in this action; there is little interest by class members in separate actions; little if any other litigation by class members, and little difficulty in management of this action as a class action. Rule 23(b)(3). As to Rule 23(b)(1)(B), it is enough that the City is required to treat all class members alike. Larionoff v. United States, 533 F.2d 1167, 1181 n. 36 (D.C.Cir. 1976); see also Eliasen v. Green Bay & Western RR Co., 93 F.R.D. 408, 412-13 (E.D.Wis. 1982).

in light of the Supreme Court's decision in City of Los Angeles v. Lyons, 103 S.Ct. 1660 (1983), certification under Rule 23(b)(2) necessitates a consideration of the standing of the plaintiff class to seek declaratory and injunctive relief.

In Lyons, the Court held that a plaintiff who had been subjected to a chokehold by a Los Angeles policeman during a routine stop for a traffic violation lacked standing to obtain declarative and injunctive relief against the City's "authorization, instruction and encouragement" of chokeholds by its police officers in non-life-threatening situations. 103 S.Ct. at 1663. The Court found that Lyons was unable to allege that "he was likely to suffer future injury

from the use of the chokeholds by police officers." 103 S.Ct. at 1667. The Lyons decision would limit relief in this action to damages, thereby precluding certification under Rule 23(b)(2), unless a sufficient likelihood of future injury can be alleged.

The Lyons Court carefully described the elements of a proper allegation of likelihood of future injury:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with police but also to make the incredible assertion either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or (2) that the City ordered or authorized police officers

to act in such a manner. (emphasis in original).

103 S.Ct. 1667.

Here, Miller can meet the exacting requirements laid down in Lyons. It is not contested that all police officers in Chicago always call for immediate towing of recovered stolen autos, since the City, by virtue of General Order 75-5, authorizes and orders them to act in such a manner.

As to the first prong of the test for standing, one factor that disturbed the Lyons Court was that Lyons' encounter with the police resulted from his violation of the law (an admittedly minor traffic ordinance). 103 S.Ct. at 1665 (discussing O'Shea v. Littleton, 414 U.S. 488 (1974)). Here, plaintiffs

need not violate the law to encounter the police behavior alleged to be unconstitutional. As victims they do not have the power to determine whether or not future encounters will occur, as could Lyons.

Further, the plaintiff class is so numerous[4] that it is a statistical certainty that some class members will again have their cars stolen and recovered by police. While the inquiry in Lyons focused upon the likelihood of future harm to the individual plaintiffs, the Court is not precluded from looking to the likelihood of future harm to the

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[4] See discussion of statute of limitations below. The class as certified contains over 150,000 plaintiffs.

class as a whole. Lyons was not certified as a class action and nothing in Lyons suggests that the decision was meant to overrule prior decisions relating to class actions. Lewis v. Tully, No. 81 C 3833, slip op. at 12-20 (N.D.Ill. 1983). Even if the inquiry were limited to the likelihood of harm to the named plaintiff, there is reason to believe that future harm may occur. Miller himself had his car stolen twice before filing the complaint in this action. Kolender v. Lawson, 103 S.Ct. 1855, 1857 n. 3 (1983), suggests that repeated past injury is a factor to be considered when assessing the likelihood of future harm.

Finally, the class, as certified, contains members who will be

harmed by General Order 75-5 until such time as the City revises its procedure. It is proper to include as members of the class persons who will suffer future injuries similar to those of other persons in the past, where both past and future injuries result from a consistent policy of a defendant without regard to any action by the prospective plaintiffs. See Tonya K v. Chicago Board of Education, 551 F.Supp. 1107, 1109-10 (N.D.Ill. 1982) and cases cited therein. The inclusion of prospective class members renders future harm a certainty. While inclusions of prospective class members may at first blush appear to be a means to circumvent the standing

requirements of Lyons, the requirements of Fed.R.Civ.P. 23 prevent such bootstrapping. Lewis v. Tully, supra at 28.

The class is therefore certified, as all persons whose stolen vehicles were or will be recovered by the Chicago Police Department and which were or will be towed without prior owner notification pursuant to General Order 75-5, paragraph III(A)(10), on or after March 15, 1977[5] and until such time as General Order 75-5

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[5]Since no federal statute prescribes the limitation period for section 1983 actions, the applicable state statute of limitations controls. Here the most relevant limitation period is the five year period for damages for detention of personal property. Ill.Rev.Stat. ch. 110, ¶13-205. The complaint in this action was filed on March 15, 1982.

is modified and approved by this Court. However, the class does not include owners of those stolen vehicles properly towable under other portions of General Order 75-5, such as vehicles obstructing traffic, posing a hazard to community safety, involved in hit and run accidents or a coroner's or public administrator's case.

The Due Process Claim

Miller alleges that by mandating the immediate towing of stolen vehicles recovered in the owners' absence, Chicago Police Department General Order 75-5 deprives the owners of the use of their autos and the charges for towing and storage, without due process of law. The City does not dispute that the denial of

use of these autos or the amounts paid for storage and towing constitute a sufficient property interest under section 1983. Sutton v. City of Milwaukee, 672F.2d 644, 645 (7th Cir. 1982) ("Since a person's car is property, the state may not deprive him of it without due process of law; and the deprivation need not be permanent to be actionable."); Valdez v. City of Chicago, 434 N.E.2d 1192, 1995-96 (3rd Dist. 1982). Therefore the Court must decide "what process is due." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982).

The City argues that due process is provided by the current post-towing hearing procedure. Municipal

Code §27-367.[6] According to the City, since the risk of vandalism or theft of the auto is extremely high and it is impracticable for the police to stand guard over the vehicle until the owner is contacted, the vehicle must be towed, subject to a later hearing. The City relies upon Parratt v. Taylor, 451 U.S. 525 (1981) for the proposition that:

> [E]ither the necessity of quick action by the State or the impracticality of providing any predepri-

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[6]Section 27-367 provides that an owner may either:

> 1. Without an immediate release of the vehicle, request a hearing be held within twenty-four hours, or
> 2. Obtain immediate release of the vehicle by requesting said hearing be held within seven days and by making a deposit of twenty-five dollars.

> vation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process. (emphasis added).

451 U.S. at 539.

The City's reliance upon Parratt is misplaced. As the Supreme Court stated in Logan v. Zimmerman Brush Co.:

> In Parratt, the Court emphasized that it was dealing with "a tortious loss of ... property as a result of a random and unauthorized act by a state employee ... not a result of some established state procedure." [citations omitted] Here, in contrast, it is the state system itself that destroys a complainant's property interest by operation of law."

455 U.S. at 435-36.

Inquiring as to whether a post-towing hearing could be meaningful for the owner of a stolen vehicle illustrates that Parratt in inapposite. Where a tow results from the owner's actions, such as abandonment or illegal parking, a post-tow hearing could meaningfully inquire as to whether the owner behaved as the City has asserted. Mays v. Scranton City Police Department, 503 F.Supp. 1255, 1262-63 (M.D.Pa. 1980). But the owners of a stolen vehicle do not contest that their vehicles were stolen. There is no issue to be heard at a post-tow hearing, since the tribunal could only determine whether towing was proper under General Order 75-5. The validity of the Order itself could not be con-

tested in the post-tow hearing. Since the City's action would always be proper as to recovered stolen vehicles, the post-tow hearing would be a meaningless formality as to the plaintiff class.

The City's assertion that recovered stolen vehicles pose in every case "the need for necessity for quick action" runs afoul of the many decisions dealing with the towing of autos. The Court is mindful of the broad scope of the City's police power. "The city's concerns in regulating the use of its streets are not limited to public safety and convenience, but also encompass public health and welfare." Gilliam v. Landrieu, 455 F.Supp. 1030, 1037 (E.D.Ca. 1978).

However, the existence of this broad power to insure public health and welfare by towing does not establish the need for immediate action, as claimed by the City.

> While the State law has an interest in removing abandoned vehicles to prevent congestion and the general deleterious effect they can have on a neighborhood, the need for immediate removal is not as pressing [as with vehicles posing a "menance to traffic"].

Tedeschi v. Blackwood, 410 F.Supp. 34, 44 (D. Conn. 1976).

A fair reading of those cases elaborating upon "immediacy" indicates that the City must take into account the situation in which it finds a vehicle when determining how quickly the vehicle must be towed and whether a pre-tow notice is needed to

satisfy due process require- ments. Craig v. Carson, 449 F.Supp. 385, 391 (M.D.Fla. 1978). For exam- ple, a vehicle that is parked ille- gally or that poses a menance to traffic could be towed without prior notice to the owner. Tedeschi v. Blackwood, supra at 43. But the plaintiff class does not contest the City's power to remove such vehicles. Miller's complaint is addressed only to vehicles that when recovered, pose no danger to traffic and are not illegally parked. Such recovered vehicles cannot be differentiated from those involved in cases of aban- doned vehicles where several courts have found that due process requires pre-towing notice. Graff v. Nicholl,

supra; Tedeschi v. Blackwood, supra; Valdez v. City of Ottawa, supra.

The case law also indicates that the conduct of the owner is relevant to whether pre-tow notice is required. An owner's failure to pay traffic or parking fines justifies towing without prior notice. Sutton v. City of Milwaukee, supra; Remm v. Landrieu, 418 F.Supp. 543 (E.D.La. 1976). Where vehicles do not display proper license plates or city registration, they may be immediately towed. Graff v. Nicholl, 370 F.Supp. at 982-83; Mays v. Scranton City Police Dept., supra. But here the owners have neither violated any traffic ordinances nor failed to properly register their vehicles. The owners of stolen vehicles invol-

ved in this case cannot be differentiated from the owners of any other vehicle on the streets.

The City also contends that pre-tow notice is impractical, since the identity of owners of recovered vehicles is not readily ascertainable. It has been noted that pre-tow notice need only be given to "those owners whose identity may practicably be ascertained." Graff v. Nicholl, 370 F.Supp. at 983. But the undisputed facts of this case show that these plaintiffs are required, in the process of reporting their cars as stolen, to provide the City with all the information needed to practicably identify and notify them. The stolen auto report contains the owner's name, home address, home and business

telephone numbers and the best time and place to contact the owner. Pre-tow notice has been mandated where an owner's identity could be ascertained from the vehicle's license plate number, far less information than that with which the City is provided in this case. Graff v. Nicholl, supra. It is currently the City's practice to contact the owners of recovered vehicles, but only after towing the vehicle. It would require no more effort for the City to contact owners upon recovery to ascertain whether they would prefer to retrieve their vehicles themselves or have the City tow and store them.

The City complains that giving pre-tow notice would require police officers who recover stolen vehicles

to "guard such auto at the scene of recovery until the owner is notified and/or arrives." This result does not follow from a requirement that pre-tow notice be given. The City is not required to insure the safety of a recovered stolen vehicle any more than that of an apparently abandoned vehicle. The vehicle would simply remain on the street until the owner is notified and either approves or objects to towing by the City.

If the City is concerned that many owners would prefer immediate towing to the possibility of theft or vandalism during the time required to receive notice, the stolen auto report filed by the owners might allow them to express that preference. That possibility is not for the Court

to decide. The Court requires only that the owners be given an opportunity to express preference before the City tows the vehicle. Whether that opportunity is given before or after the vehicle is recovered is not before the Court. Since General Order 75-5 provides no such opportunity, the Order unconstitutionally deprives owners and lien-holders of stolen autos of property without due process of law.

To summarize, the post-tow hearing provided in General Order 75-5 is an empty formality for those whose stolen vehicles are recovered and towed, therefore constitutionally inadequate. The City's contentions, that the need for immediate action precludes a pre-tow notice and that

such notice is impractical, are without merit. The City practice of towing recovered stolen vehicles without prior notice to owners, pursuant to Police Department General Order 75-5, is unconstitutional. Therefore, the City must reimburse all monies collected from those individuals subjected to this unconstitutional practice.

The Court is aware of the fact that reimbursement of towing and storage fees unconstitutionally collected from the plaintiff class imposes a financial burden upon the City. But there is no credible rationale for denying reimbursement or limiting the plaintiff class. The Court must follow the general rule that a judicial decision will be

given retroactive rather than prospective effect. N.L.R.B. v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 757 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Only in limited circumstances will a decision be given prospective effect. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971).

A decision will be given retroactive application unless: (i) the decision establishes a new principal of law either contrary to or not foreshadowed by past precedent; and (ii) retroactive application will retard the purpose and effect of the rule announced; and (iii) retroactive application would create injustice or hardship for one of the parties. N.L.R.B. v. Lyon & Ryan Ford, Inc.,

supra. The party urging prospective application carries the burden of demonstrating each of the three factors. Jiminez v. Weinberger, 523 F.2d 689, 704 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

The Court acknowledges the financial burden imposed upon the City by reimbursement. However, the remaining factors preclude prospective application. Those portions of Chicago Police Department Order 75-5 dealing with towing of recovered stolen vehicles do not differ markedly from those dealing with abandoned vehicles declared unconstitutional in Graff v. Nicholl, 370 F.Supp. 974 (N.D.Ill. 1974). That decision, in this district, involving portions of the same Police Department Order,

preceded by three years the claims of any of the plaintiffs in this action. The Graff decision put the City on notice that the towing of recovered stolen vehicles was constitutionally suspect. As a result of the Graff decision, the City rewrote those portions of General Order 75-5 dealing with abandoned vehicles, yet apparently chose not to reevaluate portions of the Order concerning recovered stolen vehicles. The decision announced today was foreshadowed by Graff and other past precedents cited in this opinion.

In addition, retroactive application will not retard the purpose and effect of a rule against immediate towing of recovered stolen vehicles. The contrary may in fact be

true. Allowing the City to unconstitutionally deprive its citizens of their property without ultimately reimbursing amounts wrongfully obtained would be unjust to innocent victims of auto theft. Since the City would not be forced to disgorge revenues obtained by constitutionally suspect practices, there would be little incentive to err in the direction of being overly protective of the rights of individuals.

IT IS THEREFORE ORDERED that:

(1) The plaintiff's motion to certify a class pursuant to Fed.R. Civ.P. 23 is granted. The class is certified as all persons whose stolen vehicles were or will be recovered by the Chicago Police Department and which were or will be towed without

prior notification pursuant to General Order 75-5, paragraph III(A)(10), on or after March 15, 1977 and until such time as General Order 75-5 is modified and approved by this Court. However, the class does not include owners of those stolen vehicles properly towable under other portions of General Order 75-5, such as vehicles obstructing traffic, posing a hazard to community safety, involved in hit and run accidents or a coroner's or public administrator's case.

(2) The plaintiff's motion for summary judgment is granted.

(3) The defendants' motion for summary judgment is denied.

(4) The City of Chicago shall submit to the Court, for approval, a

proposal of General Order 75-5, modified so as to comport with the requirements of due process.

(5) The City of Chicago shall submit to the Court, for approval, a procedure for the orderly reimbursement of class members who request reimbursement.

(6) The plaintiff shall submit to the Court, for approval, a proposed notice of class certification.

(8) (sic) A status hearing is set for December 28, 1983 at 9:30 a.m., at which time all proposals will be submitted to the Court. The parties are directed to exchange drafts of their proposals no later than two weeks prior to the date set for status hearing, and, if possible, submit agreed proposals to the Court.

ENTER:

/s/ William T. Hart

United States District

Judge

Dated: November 18, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COAD MILLER, individually, on behalf of himself and in a representative capacity on behalf of a class on behalf of a class of persons similarly situated)	
Plaintiff,	
-vs-	No.82C1607
CITY OF CHICAGO, a municipal corporation, and John Does One through Five, employees, agents and towing contractors,	
Defendants.	

MEMORANDUM OPINION AND ORDER

This case is currently before the Court for consideration of three aspects of its Memorandum Opinion and Order of November 18, 1983 requiring further refinement. In the November 18th Opinion and Order, the Court certified a class of certain owners of stolen vehicles recovered by

Chicago Police and declared unconstitutional the City of Chicago's (the "City") practice of towing such vehicles without prior notice to the owners. Subsequently, the parties filed cross-motions to redefine the plaintiff class. Disputes have also arisen as to the method for giving notice to the class and as to the City's effort to devise a constitutionally accepted procedure for handling recovered stolen vehicles.

Definition of the Plaintiff Class

In the November 18th Opinion and Order, the Court certified a plaintiff class composed of "persons whose vehicles were or will be towed without prior owner notification pursuant to General Order 75-5, paragraph IIIA(1) [recovered vehicles], on or after March 15, 1977 and during the

pendency of this action," but excluding "owners of stolen vehicles properly towable under other provisions of General Order 75-5." The City asks that the class be narrowed to exclude owners of "foreign steals," vehicles reported stolen outside of the City but recovered within the City. Miller has requested that the class be expanded by removing the exclusion of owners of recovered vehicles otherwise towable under those portions of General Order 75-5 not at issue in this action.

In his original request for class certification, Miller proposed this same class. The Court narrowed the proposed class by excluding owners of "otherwise towable vehicles, such as those hazardously parked, because Miller did not chal-

lenge the City's authority to tow such vehicles under normal circumstances. Miller maintains that the City cannot apply its normal practice of immediately towing such vehicles to recovered stolen vehicles, since the owner did not authorize the thief to so abandon the vehicle.

Miller's argument misapprehends the basis for the City's mandate to tow hazardously parked vehicles without prior notification to their owners. It is not based upon the owner's culpability, but rather upon the "serious inconvenience to [other] motorists and risk of accident." Gilliam v. Landrieu, 455 F.Supp. 1030, 1037 (E.D.La. 1978); Tedaschi v. Blackwood, 410 F.Supp. 34, 44-45 (D. Conn. 1976); Graff v. Nicholl, 370 F.Supp. 974, 982-83 (N.D.Ill.

1974). While an owner's culpable conduct may also justify towing without notice, Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir. 1982), such conduct is a separate ground for towing which does not limit the City's ability to take immediate action to remove a public hazard. Therefore, plaintiff's motion to redefine the class is denied.

The City bases its motion to redefine the class to exclude "foreign steals," on the differing degree of information in its possession with regard to vehicles stolen in Chicago and those stolen elsewhere. While the stolen auto reports filed by owners for vehicles stolen within the City contain all information needed to contact the owner (name, address, home and business telephone numbers),

no such reports are filed with the City on "foreign steals." The City obtains information on such "foreign steals" through nationwide computerized systems. These systems provide only a detailed description of the stolen vehicle and the name of the law enforcement agency with whom the vehicle was reported stolen.

The City correctly notes that "pre-tow notice need only be given to those owners whose identity may be practically ascertained," citing Graff v. Nicholl, 370 F.Supp. at 983. However, it does not follow from the paucity of information in the possession of the City when a stolen vehicle is recovered that the City is unable to practicably ascertain the owner's identity. In Graff v. Nicholl, the City was required to

give pre-tow notice to owners of presumably abandoned vehicles where there was a current license plate or registration decal on the vehicle. Since the City would identify the owner through the state registration authorities, oftentimes within 24 hours, the owner's identity was found to be practicably ascertainable. 370 F.Supp. at 983.

Here, the City possesses similar registration information, as well as the name of the law enforcement agency possession the owner's identity. The City has made no showing that obtaining the owner's identity is more burdensome here than was the case in Graff v. Nicholl. For all it appears, a simple phone call to the police agency with whom the vehicle was reported stolen will give the

City all the information needed to contact the owners. Nonetheless, the effort and expense of contacting owners who reside outside the Chicago metropolitan area is obviously greater. Further, the likelihood that owners would attempt to save towing and storage fees by traveling to Chicago to remove their vehicles decreases as the distance of the owner's residence from the City increases. Therefore, the City's motion to redefine the class is granted in part and denied in part. The plaintiff class will be narrowed to exclude the owners of vehicles recovered in Chicago but reported stolen outside the greater Chicago metropolitan area, defined as the Chicago Standard Metropolitan Statistical

Area. 1980 Census of Population, Table 11.

Notice to the Class

Plaintiff and the City differ as well on the method of giving notice to the class of this action. Plaintiff is willing to undertake the effort to send individual notice to class members by mail.[1] The City prefers notice solely by publication. The information needed to give individual notice to the plaintiff class is contained on roughly 100,000 stolen vehicle tow records for which

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[1]Although plaintiff has indicated a willingness to bear the initial expense of sending notice by mail, those costs would be recoverable under 42 U.S.C. §1988. Therefore, the Court requested, and has been provided with, the parties' estimates of the costs of notice by mail and by publication.

must be found from among roughly 500,000 unsegregated tow records. Further, the City contends that its address information on owners from as long ago as early 1977 may no longer be accurate, because many owners will have moved.

However, the Supreme Court's decision in Eisen v. Jacquelin, 417 U.S. 156 (1974) is to the contrary. "[I]ndividual notice to identifiable class members is not a discretionary consideration to be wavied in a particular case. It is, rather, an unambiguous requirement of Rule 23." 417 U.S. at 176. While Eisen dealt with the notice requirements for a class action brought under Fed.R.Civ. P. 23(b)(3), see 417 at 177 n. 14, the expressed preference for individual notice rather than notice by

publication was based on broader requirements of due process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (cited in Eisen); Simer v. Rios, 661 F.2d 655, 667 n. 22 (7th Cir. 1981).

Further, the requirement of Fed. R.Civ.P. 23(e), that individual notice be given of dismissal or compromise, applies to all class actions. Therefore, individual notice by mail is appropriate in this case and may be supplemented with notice by publication in the event that significant numbers of mail notices are returned as undeliverable.

The Proposed Procedure

In response to the November 18th Opinion and Order, the City has proposed two related changes to its current procedure for handling recover-

ed stolen vehicles. These include: (1) an addition to the Vehicle Theft Case Report form ("Complaint"), which allows the owner to express a preference for either immediate towing or merely notification upon recovery of the vehicle; and (ii) a recovery procedure that calls for pre-tow notice to owners of vehicles which are "LEGALLY PARKED and do not constitute a hazard," where the owner has expressed a preference for notice. Miller has objected to the proposed changes on the basis that they subject victims of auto theft to "a form of duress" so that their consent to immediate towing would be meaningless.

Miller's objection is without merit. THe victims of auto theft are indeed presented with a hard choice, whether to pay for towing and storage

or to risk further damage to their vehicles before they can recover them. But they are put to this choice by the thief, not the City.

While the addition of a consent provision to the Complaint is acceptable in principle, the City's current proposal fails to provide sufficient information to enable the complainant to make an informed choice. See Geeto v. City of Chicago, 86 Ill.2d 39, 426 N.E.2d 844, 849-50 (1981). The complainant must be told, preferably in writing, that: (i) an immediate tow by police will involve payment of towing and storage fees; and (ii) if notice is chosen, the complainant bears all risk of loss and the City will make no special effort to protect the vehicle until the owner recovers it. The City's propo-

sed consent provision says nothing on either subject.

Another troublesome aspect of the City's proposal is the repeated emphasis placed upon whether the vehicle is legally parked when recovered. The November 18th Opinion and Order did note the City's ability to tow illegally parked vehicles, p. 12. Nonetheless, the clear message of the November 18th Opinion and Order is that the City is required to treat recovered stolen vehicles in the same way it treats any other vehicle on the streets. There is no rational basis for distinguishing recovered stolen vehicles from other vehicles. Therefore, if the recovered vehicle is properly towable under the unchallenged provisions of General Order 75-5, it may be towed without regard

to its status as a recovered stolen vehicle. But if a recovered vehicle is parked illegally, for example, at an expired meter, it may not properly be towed where other vehicles would not be towed. Since the City's proposed recovery procedure identified by its reference to other portions of General Order 75-5, those occasions when a recovered vehicle may properly be towed, all references to "LEGALLY PARKED" must be stricken.[2]

IT IS THEREFORE ORDERED that

(1) The plaintiff's motion to redefine the plaintiff class is denied.

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[2]For the reasons set forth in regard to the definition of the plaintiff class, the references to

(Footnote Continued)

(2) The City's motion to redefine the plaintiff class is granted in part and denied in part. The class is redefined as:

> Owners of stolen vehicles recovered by the Chicago Police Department towed without prior notice to the owner, pursuant to paragraph III(A)(10) of its General Order 75-5 during the period from March 15, 1977 to the date on which this Court approves a modified version of General Order 75-5, but not owners of vehicles either: (i) reported stolen with law enforcement agencies located outside the Chicago Standard Metropolitan Statistical Area, or (ii) properly towable, when recovered, under other portions of General Order 75-5 (e.g., vehicles obstructing traffic, posing a hazard to community safety, involved in hit and run accidents).

(Footnote Continued)
"foreign steals" must also be revised.

(3) Individual notice to members of the plaintiff class will be mailed. Counsel are directed to meet for the purpose of drafting this notice (in the form set forth at 100 F.R.D. 378) for submission to the Court on June 14, 1984 at 9:00 A.M.

(4) On that same date, the City is directed to submit revised proposals for Vehicle Theft Report forms and Recovery Procedures.

(5) The City's proposed Claims Procedure is entered and continued to the June 14, 1984 status hearing date.

ENTER:

/s/ William T. Hart
United States District Judge

Dated: May 25, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COAD MILLER, individually, on behalf of himself and in a representative capacity on behalf of a class on behalf of a class of persons similarly situated,	
Plaintiff,	
-vs-	No.82C1607
CITY OF CHICAGO, a municipal corporation, and John Does One through Five, employees, agents and towing contractors,	
Defendants.	

JUDGMENT ORDER

This cause is before the Court for the purpose of granting plaintiff, and the class he represents certain declaratory relief and entering a permanent injunction against the defendant and providing such class with an opportunity to seek reimbursement of towing and storage

fees, and where such reimbursement claim is denied by defendant, to provide a hearing to review the denial of such claim and the underlying legality of the "immediate tow" of their recovered stolen vehicle by defendant, all in accordance with the Court's Memorandum Opinions entered November 18, 1983 and May 25, 1984 which are incorporated herein, as to their findings of fact, conclusions of law and reasons for granting the relief described herein pursuant to Rule 65(d) Federal Rules of Civil Procedure.

The Court having considered the arguments advanced by counsel for the respective parties, and being otherwise fully advised in the premises, finds that:

1. It has jurisdiction of the parties herein, including the plaintiff, Coad Miller, and each and every member of the class of individuals he represents, as defined in said Memorandum Opinions of November 18, 1983 and May 25, 1984 and further described herein, and the defendant, CITY OF CHICAGO, a municipal corporation.

2. As a result of its procedures and practices, set forth in said Memorandum Opinions and described hereinafter, the defendant, CITY OF CHICAGO, is obligated to make restitution to members of said class who request reimbursement, and who are verified as class members by the City of Chicago for towing and/or storage charges imposed as a result of such "immediate tows" of recovered

stolen vehicles without prior notice to the owner of such vehicle.

3. After weighing the mechanics and costs that will necessarily follow as a result of this Judgment Order, the Court concludes that the provisions herein regarding the class to show entitlement to restitution are equitable and just.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

DECLARATORY RELIEF

The procedures and practices of the defendant, CITY OF CHICAGO, as reflected in its Police Department's General Order Number 75-5 (III)(A)(10), and Police Department General Order 83-12(III), as amended, which relates to all stolen recovered vehicles as "immediate tows", are adjudged and declared to be

unconstitutional insofar as such vehicles are not properly classified as towable under other portions of General Order 75-5 and General Order 83-12 as amended, such as, but not limited to vehicles obstructing traffic, posing a hazard to community safety, involved in hit and run accidents or a coroner's or public administrator's case, or involved in the commission of a crime, or used or intended for use to transport any controlled substance. The aforesaid act of towing and storing is unconstitutional insofar as it denies the plaintiff, and the class he represents, notification and approval prior to the tow and storage of a recovered stolen vehicle.

On August 15, 1984, the defendant, City of Chicago, also presented

a proposed Department General Order #_____[1] entitled Wanted Vehicle Notification to Field Inquiry Section Auto Reporting Desk. This Department General Order #_____* entitled Wanted Vehicle Notification to Field Inquiry Section Auto Reporting Desk will be implemented on September 4, 1984. The Court has examined such Department General Order #_____* and finds that this Department General Order #_____* which is attached hereto and made a part of this Judgment Order, would remedy the constitutional infirmities which are the subject matter of this litigation (See Exhibit No. 1).

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[1]A number for the General Order will be inserted upon approval of
(Footnote Continued)

INJUNCTIVE RELIEF

The defendant, CITY OF CHICAGO, and its agents, servants, employees, or other persons under its direction and control, are hereby permanently enjoined and restrained from enforcing, implementing, maintaining, or in any way promulgating any ordinance, rule, practice or procedure which requires or permits recovered stolen vehicles which are not properly classified as an immediate tow under other portions of General Order 75-5 and General Order 83-12 as amended, to be towed, and stored without prior owner approval of such tow and/or storage.

(Footnote Continued)
such General Order by the Court and upon publication by the Chicago Police Department.

CLASS RELIEF

The Class herein includes all those individuals whose motor vehicles were stolen, and when recovered by the Chicago Police Department were towed, by the Chicago Police Department, or other authorized agents, employees or contractors of the City of Chicago between March 19, 1977 and September 4, 1984, pursuant to General Order 75-5 and General Order 83-12 as amended and were not properly classified as towable under other portions of General Order 75-5 and General Order 83-12 as amended such as, but not limited to, vehicles obstructing traffic, posing a hazard to community safety, involved in hit and run accidents or a coroner's or public administrator's case, involved in the commission of a crime, or was

used or intended to be used to transport any controlled substance.

1. Class members must individually show entitlement to restitution as set forth herein.

2. Defendant City of Chicago shall cause to be mailed the Notice of Class Action (See attached Exhibit #2) to each owner of a recovered stolen vehicle as reflected by Chicago Police Department Records. The mailing of such Notice of Class Action shall be within one hundred twenty (120) days of the date of this Order.

3. Defendant, CITY OF CHICAGO, shall cause a list of names and addresses of all potential recipients of a Notice of the instant class action to be filed with the United States District Court Clerk on the same day that such individual Notice

of Class Action is mailed to each potential recipient, whereby any individual or entity who may have an interest in the instant cause may refer to such list in order to determine the identities of recipients of such Notice.

4. Defendant, CITY OF CHICAGO, shall also cause to be published the Notice of Class Action attached hereto as Exhibit No. 3 in the Chicago Sun-Times, Chicago Tribune, the Daily Defender and LaRaza in the City of Chicago on one (1) occasion.

5. Such publication shall be within one hundred twenty (120) days of the date of this order and shall appear in publication on the same day that the Notice of Class Action is mailed to these class members whose

identities can be ascertained from Chicago Police Department records.

6. The Court finds that each person, who so desires, may make a claim for restitution by requesting a determination of his eligibility as a class member entitled to such restitution within thirty (30) days from the date of the mail notice and/or within 30 days of the day of newspaper publication of the class notice (See Exhibit #3). A decision on eligibility to be within the class entitled to restitution will be made within thirty (30) days of receipt of the "Claim for refund for Towing and Storage Charges". Any person who fails to request restitution by requesting a determination of his eligibility through the Claim for refund of Towing and Storage Charges

within thirty (30) days of the mail notice and/or within thirty (30) days of publication of the class notice shall be barred from seeking restitution of the towing and storage charges. Postmark shall be conclusive evidence of compliance with any notice provision herein.

7. In order to obtain a determination of eligibility as a class member entitled to restitution for towing and/or storage charges of his recovered stolen vehicle, each person whose vehicle was towed between June 1, 1978 and September 4, 1984 shall complete and mail the postcard or postcard facsimile entitled "Claim for Refund for Towing and Storage Charges" (Exhibit #4) which accompanied the Notice of Class Action. Such postcard or postcard facsimile

must be completed, mailed and postmarked within thirty (30) days from the date of notice. If a person fails to request a decision on his eligibility to be within this class or fails to opt out of this lawsuit within thirty (30) days from the date of mail notice or published notice, such person will be barred from seeking restitution of the towing and storage charges. Postmark shall be conclusive evidence of compliance with the notice provisions herein.

8. In order to obtain a determination of eligibility as a class member entitled to restitution for towing and/or storage charges of his recovered stolen vehicle, each person whose vehicle was towed before March 15, 1977 and June 1, 1978 shall submit the receipt (or copy thereof)

furnished that class member by the Chicago Police Department, or a cancelled check, money order receipt or other receipt evidencing payment of towing and/or storage charges to the following address:

Auto Pound Section
Chicago Police Department
Automotive Pound Section
Attn: Tow Reimbursement Officer
1121 South State Street
Chicago, Illinois 60605

Such documentation must be mailed and postmarked within thirty (30) days from the date of notice. If a person fails to request a decision on his eligibility via submission of the aforesaid documentation, or copy thereof, or fails to opt out of this lawsuit within thirty (30) days from the date of published notice, such person will be barred from seeking restitution of the towing and

storage charges. Postmark shall be conclusive evidence of compliance with the notice provisions herein.

9. In the event that it is determined that any person who properly completed a "Claim for Refund for Towing, and Storage Charges" as described in paragraph 7 above or submits the documentation as set forth in paragraph 8 above is a class member and therefore entitled to restitution as provided in this Judgment Order as a result of an improper tow of his recovered-stolen vehicle, the defendant shall forward a check in the appropriate amount to such claimant.

10. In the event that it is determined that any person who properly completes a "Claim for Refund for Towing and Storage Charges" or sub-

mits documentation as required in paragraph 8 above is not a class member and therefore not entitled to restitution as provided in the Judgment Order, a notice of rejection will be forwarded to such individual. Upon receipt of such notice of rejection, if an individual still believes that he is entitled to restitution, such individual may request a hearing to review the decision to reject the claim for towing and/or storage charges. In order to obtain a hearing on such rejected claim, such individual must make a request in writing within thirty (30) days from the date of his rejection notice. In order to make a request for a hearing, such individual must check the box preceding the statement "I request a hearing on the decision to reject my claim for tow-

ing and/or storage charges" which appears at the bottom of the letter (See Exhibit #5) informing of such rejection of his claim and then the individual shall sign his name. All such written requests for hearings on the rejection of claims must be directed to:

Auto Pound Section
Chicago Police Department
Automotive Pound Section
Attn: Tow Reimbursement Officer
1121 South State Street
Chicago, Illinois 60605

A hearing will be scheduled within thirty (30) days of a written request for a hearing on such rejection. The individual will be notified by mail of the place, date and time at which the hearing will be held. The decision at such hearing to review the rejection will be final and binding. If an individual does

not mail a request for a hearing to review his claim of rejection within thirty (30) days from the date of his notice of rejection, such individual will be barred from claiming improper rejection of his claim for towing and storage charges.

11. Hearings for class members shall be conducted in accordance with the procedures set forth in Exhibit No. 6 except where provided herein to the contrary. There will be no appeal from the decision at such hearing.

12. In the event that any person does not want to be a class member and wants to opt out of the instant class, such person must request exclusion before January 18, 1985. To request exclusion such person must check the box preceding the statement

"I do not wish to be included in this class action" which appears at the bottom of the postcard or postcard facsimile entitled Claim for Refund for Towing and Storage Charges (See Exhibit #4). Such person must sign the bottom of the postcard or postcard facsimile and mail it to:

Chicago Police Department
Automotive Pounds Section
Attn: Tow Reimbursement Officer
1121 South State Street
Chicago, Illinois 60605

Thus in order to preserve one's right to exclude himself from the instant class action, such person must make a request for exclusion via the postcard or postcard facsimile entitled Claim for Refunding for Towing and Storage Charges before January 18, 1985. If such person does not request exclusion from the class or hire his own attorney, he will be

represented in this matter by the plaintiff through plaintiff's counsel. If such person remains in the class action, he will be bound by any judgment entered.

13. Restitutions required by this Judgment Order shall be made within ninety (90) days of the determination that the individual class member is entitled to such payment.

14. Said Notices of Class Action (Exhibits No. 2 & 3) are incorporated herein by reference and made a part of this Judgment Order. Further said Notice of Class Action, and all terms and conditions therein, upon mailing and publication, shall be binding upon all members of the class.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

1. Restitution shall be made to plaintiff, COAD MILLER, in the amount of FIFTY AND NO/100 ($50.00) DOLLARS in full payment of any and all damages sustained by him as a result of the towing of his vehicle which is, in part, the subject matter of this litigation. Plaintiff shall execute a General Release relative to such damages.

2. The defendant, CITY OF CHICAGO, has not waived any right it may have herein by its preparation and/or presentation of the form of the Notice to class members, proposed procedure to determine class eligibility, or any documents or notices. Further, no such action will be construed in any way to prejudice any such right, including but not limited, to the right of appeal.

3. The defendant, CITY OF CHICAGO, shall cause a final report to be filed with the United States District Court Clerk within a reasonable time after the close of the claims period outlining the total number of claims, the number of accepted claims, and rejected claims.

4. This Judgment is final and enforceable as of the date of its entry and there is no reason to delay the enforcement or appeal of this Judgment Order.

ENTER:

_____
Judge William T. Hart

DATED: _____

APPENDIX B

Opinion of the Court of Appeals

for the

Seventh Circuit

Decided September 24, 1985

Coad MILLER, Individually and on behalf of himself, and in a representative capacity on behalf of a class of persons similarly situated, Plaintiff-Appellee,

v.

CITY OF CHICAGO, et al., Defendants-Appellees,

and

Merit Insurance Company, et al., Intervening Petitioners-Appellants.

Coad MILLER, Individually and on behalf of himself, and in a representative capacity on behalf of a class of persons similarly situated, Plaintiff-Appellee,

v.

CITY OF CHICAGO, et al., Defendants-Appellants.

Coad MILLER, Individually and on behalf of himself and in a representative capacity on behalf of a class of persons similarly situated, Plaintiff-Appellant,

v.

CITY OF CHICAGO, a municipal corporation, and John Does, One through Five, employees, agents and towing contractors, Defendants-Appellees.

Nos. 84-2329, 84-2614 and 84-2640.
United States Court of Appeals
Seventh Circuit.
Argued June 6, 1985
Decided Sept. 24, 1985.

Owner of recovered stolen vehicle brought class action against city

and certain individuals challenging constitutionality of city's procedures for towing recovered stolen automobiles and seeking reimbursement to class members for towing and storage charges assessed against them by city. The United States District Court for the Northern District of Illinois, Eastern Division, William T. Hart, J., granted owner's cross motion for summary judgment, and denied city's cross motion, and city appealed. The Court of Appeals, Cummings, Chief Judge, held that procedures for towing stolen vehicles without giving prior notice to vehicle owner did not constitute deprivation of property without due process.

Reversed and remanded with instructions.

Mary K. Rochford, Corp. Counsel, Chicago, Ill., for City of Chicago.

Marshall Patner, Orlikoff, Flamm & Patner, Chicago, Ill., for Miller.

Before CUMMINGS, Chief Judge, WOOD, Circuit Judge, and WRIGHT, Senior Circuit Judge.[1]

CUMMINGS, Chief Judge.

This appeal involves a certified class action brought under 42 U.S.C. §1983 against the City of Chicago and certain individuals challenging the constitutionality of the City's procedures for towing recovered stolen automobiles and seeking reimbursement to class members for towing and storage charges assessed against them by

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[1]The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

the City. The only named plaintiff, Coad Miller, owned a 1973 Volkswagen that was stolen on November 5, 1981, found by two Chicago police officers and towed to a city pound. Plaintiff was notified by mail that the vehicle was recovered and paid defendant City of Chicago a $45 towing charge and a $5 one-day storage charge to recover his car. He did not request a hearing to contest the charges. The five individual John Doe defendants are the two police officers who recovered plaintiff's car and three others who caused the car to be towed to the pound. The relief requested was an order preserving certain municipal records concerning stolen cars, class certification, a declaratory judgment and injunction as to the City's procedures for towing stolen cars and

the establishment of a fund to reimburse class members for towing and storage charges and to provide for attorney's fees and costs.

The district court in a November 22, 1983, memorandum opinion concluded that the City's practice of towing recovered stolen vehicles without prior notice to owners violated the due process clause of the Fourteenth Amendment and granted plaintiff's cross-motion for summary judgment (R. Item 29).[2] Defendant City of Chicago whose cross-motion for summary judgment was denied, and amici curiae (see infra note 2) argue that pre-

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[2]The court filed a second memorandum opinion on May 25, 1984 (R. Item 49), and its final judgment order on August 22, 1984 (R. Item 61).

tow notice and hearing are not constitutionally required under these circumstances and that the City's post-tow notice and hearing procedures satisfy the requirements of due process. For the reasons set forth below, the judgment of the district court declaring the procedures and practices of the City relating to the immediate towing of recovered stolen vehicles unconstitutional and enjoining the City from towing and storing such vehicles without prior owner approval for towing or storage is reversed.

I

The City of Chicago's procedures regarding the recovery of stolen vehicles are set forth in Section 27-367 of the Municipal Code of Chicago and in an internal Chicago Police Depart-

ment document, Chicago Police Department General Order 75-5. General Order 75-5 requires the immediate towing of certain classes of vehicles, including vehicles that have been reported stolen where the vehicle's owner is not present at the location of the recovery (R. Item 29). The Order also requires police personnel of the Automotive Pound Section Headquarters to "prepare and mail a notice * * * to vehicle owners, advising them of the towing and the hearing" (id). Section 27-367 of the Municipal Code of Chicago states that the owner of a legally impounded vehicle may obtain immediate possession thereof by furnishing evidence of identity and ownership and paying a towing fee of forty-five dollars (sixty-seven dollars for trucks and

commercial vehicles) and storage costs of five dollars per day. Payment of these charges may be challenged, however, pursuant to Section 27-367, by means of 1) requesting a hearing to be held within twenty-four hours at which the validity of the tow may be contested (i.e., here whether the car was in fact reported stolen) or 2) securing immediate possession of the vehicle by depositing twenty-five dollars with the police and requesting a hearing to be held within seven days at which the validity of the tow may be contested. (Municipal Code of Chicago, §27-367, R. Item 1, Exhibit A). The notice sent plaintiff Miller stated:

> You are entitled to additional information regarding the reason for this tow, whether the vehicle can be immediately released and whether it is subject

> to charges. You are also entitled to a hearing, if you desire, to determine the validity of the tow or extended hold of your vehicle and any towing or storage charges (Br. 7; R. Item 16, Attachment F).

The notice also informed plaintiff how the hearing could be arranged.

Illinois law empowers police officers "to remove or cause to be removed to the nearest garage or other place of safety any vehicle" which has been reported "stolen or taken without the consent of its owner." ILL.REV.STAT. ch. 95-1/2, §11-1302 (1983). Additionally, ILL. REV.STAT. ch. 95-1/2, §4-202 (1983), provides that when municipal police receive notification of a stolen vehicle they "will authorize a towing service to remove and take possession of the * * * stolen * * vehicle."

As summarized, supra, on March 15, 1982, plaintiff Miller filed a complaint with the United States District Court for the Northern District of Illinois requesting that the towing provisions set forth in the Municipal Code of Chicago and the Police Department Order be declared unconstitutional, that the City be enjoined from enforcing the provisions, and that a fund be established from which the suggested class of plaintiffs could recover towing and storage charges assessed within the relevant statute of limitations period. In a November 18, 1983, memorandum opinion the district court certified the class action and granted plaintiffs' motion for summary judgment, ruling that the defendants' procedures for towing stolen automobiles were uncon-

stitutional because pre-tow notice was not provided to owners of stolen vehicles. Miller v. Chicago, No. 82 C 1607 (N.D.Ill. Nov. 18, 1983) (R. Item 29). In its second memorandum opinion the district court redefined the class, required notice by mail to the class members, directed the City to submit revised proposals for Vehicle Theft Report Forms and Recovery Procedures, and acknowledged receipt of the City's proposed Claims Procedure (R. Item 49). The final judgment order in the case was entered on August 22, 1984, and enjoined the defendants from towing recovered stolen vehicles without prior notice, required the City to provide notice of the class action to plaintiff class, and set forth a system for recovery of towing and storage charges (App.

3). On appeal defendants challenge the district court's ruling on the constitutionality of the towing procedures, the inclusion of certain persons in the plaintiff class and the award of retroactive relief. Four insurers[3] and the National Automobile Theft Bureau, Inc. have filed a brief amici curiae urging reversal of the judgment.

II

The constitutional question presented by this case is whether the defendants' procedures of towing stolen vehicles without giving prior notice to the vehicle owner

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[3]The amici insurers are Alliance of American Insurers, American Insurance Association, National Association of Independent Insurers and State Farm Mutual Automobile Insurance Company.

constitute a deprivation of property with- out due process of law in violation of the Fourteenth Amendment. Defen- dants concede that the towing of a recovered vehicle reported stolen amounts to a temporary deprivation of property (Br. 16). Both parties agree that the property interest at issue here is the use of a vehicle (Br. 16; R. Item 19). See Sutton v. Milwaukee, 672 F.2d 644, 646 (7th Cir. 1982). In the district court plaintiff attacked the City's procedures on the basis of their failure to provide for pre-tow or pre-depri- vation notice (R. Item 19, at pp. 2, 5-6, Memorandum in Support of Plain- tiffs' Cross Motion for

Summary Judg- ment).[4] He asserts that the City should provide an opportunity to own- ers of located stolen vehicles to re- cover their own property and thereby avoid payment of towing and storage costs (id.). No pre-deprivation hearing is requested in the complaint (R. Item 1 at pp. 5-6) or on appeal (Pltf. Br. 23-24) and, indeed, one would serve no purpose under these circumstances where such a hearing would not appear to hasten the return of the recovered stolen vehicle to its owner and where pre-tow notice

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[4] In his enigmatic brief on appeal plaintiff does not contend that pre-tow notice is required, stating it is "a point not at issue" (Pltf.Br. 8), but of course it is a major point of defendants' appeal and therefore must be considered.

itself may preempt the deprivation of property.

[1] The Supreme Court has often asserted that the requirement of due process "is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; see United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555, 564, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143; Schweiker v. McClure, 456 U.S. 188, 200, 102 S.Ct. 1665, 1672, 72 L.Ed.2d 1. In Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.E.2d 18, the Court specifically considered in which situations due process requires notice and a hearing prior to a dep-

rivation of property. In answering this question in the negative where benefits were terminated subject to later notice and hearing Mathews offered a three-part standard for resolution of the issue. The inquiry requires consideration of 1) "the private interest that will be affected by the official action," id., including "the importance of the private interest and the length or finality of the deprivation," Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 102 S.Ct. 1148, 1157, 71 L.Ed.2d 265,; see Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30; 2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional or substitute

procedur- al safeguards," Mathews, 424 U.S. at 335, 96 S.Ct. 903; and 3) "the gov- ernment's interest, includ- ing the function involved and the fiscal and administrative burdens that the addi- tional or substitute proceedings would entail." Id. These factors must be balanced in one manner, see Sutton, 672 F.2d at 645-646, but Mathews gives no indication as to the relative weight properly accorded each. It is of some help to apply the Mathews tripartite test in light of the general rule, recently reiter- ated by the Supreme Court, that "ab- sent an 'extraordinary situation' the power of the state to seize a per- son's property may not be invoked without prior notice and an oppor- tunity to be heard." United States

v. $8,850, 461 U.S. at 562, n. 12, 103 S.Ct. at 2011, n. 12; see Fuentes v. Shevin, 407 U.S. 67, 90, 90 n. 22, 92 S.Ct. 1983, 1999, n. 22, 32 L.Ed. 2d 556; Boddie v. Connecticut, 401 U.S. 371, 378-379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113; Breath v. Cronvich, 729 F.2d 1006, 1010 (5th Cir. 1984), certiorari denied, ___ U.S. ___, 105 S.Ct. 332, 83 L.Ed.2d 268; but cf. Sutton, 672 F.2d at 647 (questioning the continued validity of the "extraordinary situation" rule stated in Fuentes, supra). Thus pre-deprivation notice and hearing represent the norm and the state must forward important reasons to justify a departure therefrom.

[2] In Fuentes the Court clarified what constituted an extraordinary situation obviating the need for

pre-deprivation notice and hearing. It noted that in each case where the Court had allowed such seizures the following three factors had been present:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

407 U.S. at 91, 92 S.Ct. at 2000; see Breath, 729 F.2d at 1010. In this case plaintiff sought only pre-deprivation notice but not a hearing (R. Item 19). Nevertheless the defen- the defendants' procedures must be

scrutinized under a standard as strict as that set forth in Mathews. In view of the fact that provision of pre-deprivation notice would be as injurious to the City's interest as pre-deprivation notice and hearing were to the government interest in the Supreme Court cases sanctioning deprivations without predeprivation notice and hearing, see infra pp. 193-194, the City's policy need not be analyzed under a more restrictive test. Application of the Mathews standard, in light of the three factors set forth in Fuentes, reveals that defendants are not constitutionally required to provide predeprivation notice in this situation.

III

The property interest involved here is not of prime significance for

the impounding of stolen cars is temporary. But of course the use of one's automobile is certainly an important interest, and deprivation of it for more than a brief period could interfere severely with "[a] person's ability to make a living and his access to both the necessities and amenities of life." Stypmann v. San Francisco, 557 F.2d 1338, 1342-1343 (9th Cir. 1977). The length of the deprivation caused by the City's present procedures would appear to be a few days (the time required for preparing, mailing and arrival of written post-tow notice and if no deposit is made a maximum additional 24 hours, see supra pp. 189-190) - but still a period longer than the "few hours" at issue in Sutton, 672 F.2d at 646, and the forty-eight

hours involved in Goichman v. Rheuban Motors, Inc., 682 F.2d 1320, 1324 (9th Cir. 1982) (city's post-seizure hearing following towing of vehicles satisfies due process requirements). Such a detention is certainly an annoyance. See Stypmann, 557 F.2d at 1344 ("days, even hours, of unnecessary delay [in returning automobile] may impose onerous burdens upon a person deprived of his vehicle").[5]

The degree of importance attached to the property interest in this situation is attenuated, however, by the fact that in a very real essence it is not the City that has caused the vehicle owner's depriva-

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[5]Finality of the deprivation is not a concern in these vehicle towing cases.

tion, but rather the thief of the vehicle. Unlike the instances involving municipal or state towing of illegally parked and abandoned automobiles, here the government is only reacting to a prior private deprivation of property and attempting to carry out its obligation to protect the public. It is not the sole and initial force coming between the owner and his or her vehicle. Indeed these circumstances may be viewed as involving no municipal deprivation at all in the sense that if the City had not acted responsibly in discovering the stolen vehicle, the privately caused deprivation would simply continue (excluding the unlikely possibility that an owner might come upon the stolen vehicle by himself), and it is therefore unfair to view the

time expended in returning the recovered vehicle as a true deprivation since without the City's efforts the private deprivation almost assuredly would have continued. On the other hand, since plaintiff argues that there is no need for the police to take custody of these vehicles in the first instance (Pltf. Br. 10) and since defendants concede that the towing is a slight deprivation (Br. 16), for purposes of Mathews analysis the private interest here will be treated as significant but not great.

The risk of government error here is extremely slight. The determination that a particular vehicle has been reported stolen is a "cut and dried" one, Sutton, 672 F.2d at 646, much like the determination of a parking violation in Sutton, and un-

like the determination of whether a car has been abandoned where the subjective intent of the owner is at issue. See Tedeschi v. Blackwood, 410 F.Supp. 34, 45 (D.Conn. 1976). Here not only does the owner himself provide the information necessary to make the determination of theft, but Police Department General Order 75-5 requires an officer to check with police headquarters to confirm the status of the vehicle according to the license or registration number (R. Item 1, Exhibit B).

The pre-tow notice originally requested in this case could prevent the removal of a vehicle that has already been recovered by the owner or which remains erroneously listed as reported stolen, just as a hearing could, but the likelihood of such

errors is small and plaintiff has not argued for pre-tow notice on the basis that it will prevent erroneous deprivations. The principal value of the district court's proposed additional safeguards here, namely, pre-tow notice that would permit the vehicle owner to remove the auto himself, would spare the owner the cost of towing and storage charges and of course would provide him with immediate possession of the vehicle. Since the towing and storage charges are ordinarily covered by standard auto insurance policies (see infra note 5), the only benefit that would normally result from pre-tow notice is earlier possession of the car.

But the municipal government has a substantial interest in promoting the public welfare and safety by the

prompt removal of stolen vehicles to a safe place, an interest wholly apart from its interest in returning the vehicle to its owner. Specifically, the speedy removal of discovered stolen vehicles promotes the City's interests in terminating the thief's illegal possession of the vehicle, preventing the illegal use of the vehicle by the thief or other unauthorized person (perhaps in other crimes), preventing the illegal sale of the vehicle or its dissection for removal of parts, and preventing the operation of the vehicle in a hazardous manner (Br. 17; Amici Br. 4-7). In summary, stolen vehicles pose special dangers to the public and the City or state has a legitimate interest in dealing with those hazards. The district court consequently erred

in its analysis by according absolutely no weight to this interest independent of the City's obligation to facilitate the return of these vehicles.

The district court rejected the defendants' claim that recovered stolen cars necessitate their quick action in every case by analogizing and finding indistinguishable cases involving abandoned or illegally parked vehicles where prior notice and hearing requirements may be dispensed with only if the particular vehicle poses an actual danger to traffic or other menace (11/18/83 Order at 11, R. Item 29). This analogy is inapt because of the inherent concerns that exist with respect to a recently discovered stolen vehicle. Whereas the need for immediate action

can be determined on the spot where the only concern is danger or inconvenience to traffic or pedestrians as is the case with abandoned or illegally parked cars, each stolen vehicle present potential dangers or concerns that are not immediately ascertainable by police officers. For example, the thief or subsequent possessor may return to the vehicle and remove it at any time for further illicit and dangerous use. It is possible that the stolen vehicle has been abandoned, but that fact will not often be readily apparent. Moreover, each stolen vehicle has been the object of a felony. Thus ascertaining the best means of returning a recovered stolen vehicle to its owner is not the sole issue in this case and certainly police officers cannot dis-

count the possible need for immediate action at the scene of recovery. To the extent the district court's statement that stolen vehicles involve no more immediate concerns than do abandoned or other types of vehicles represents a finding of fact, such a finding is clearly erroneous.

In view of the above-outlined City interests the feasibility and actual value of Judge Hart's proposed pre-tow notice must be seriously questioned. The district judge concluded that "[i]t would require no more effort for the City to contact owners upon recovery to ascertain whether they would prefer to retrieve their vehicles themselves or have the city tow and store them" than the City's "current practice" of post-recovery notice and a hearing (11/18/

83 Order at 13, R. Item 29). This observation plainly ignores the reality of the situation and the City's legitimate independent interest in securing the vehicle. The system envisioned by plaintiff would require notice via telephone by police officials immediately after confirmation of a requested stolen vehicle check by officers in the field, for pre-tow written notice would not lessen the period of deprivation of the property interest. It is said that stolen vehicle owners could indicate their desire to receive telephone notice on their stolen vehicle report which also contains the owner's home and work telephone numbers (id. at 3). In light of the City's legitimate independent interest in securing the stolen vehicle, this procedure of

phone notice would require the police to remain at the site of the discovered stolen vehicle until the owner could be contacted, could reveal whether he could retrieve the vehicle promptly, and when he might actually arrive to recover it. If the auto or truck turned out not to be functional after the owner's arrival, more police time would be consumed. Moreover, as amici curiae observe, if plaintiff's proposals were put in effect, the City could not even tow stolen vehicles until after a seven-day waiting period (Amici Br. 8). This extended use of police time invariably would involve consumption of more police time than the present system utilizing a towing service regularly engaged in this type of activity and able to remove vehicles

whether they are functional or not. Because of the uncontested reliability of the towing service under the current system, the police could leave the scene prior to the arrival of the tow truck, knowing the stolen vehicle shortly would be removed. These considerations highlight the administrative burden of instituting the phone notice system which would have to deal with the approximately 22,000 stolen vehicles recovered annually in the City (Br. 19).

The actual value of the district court's additional proposed safeguards must be reassessed in light of the City's independent interest of the prompt securing of these vehicles. Accepting the undenied premise that the police cannot allow the recovered vehicles to remain on the

streets for hours or days, the benefits of the phone notice system (possibly immediate possession without towing charges) would only accrue to those car owners who could be contacted upon the discovery of the stolen vehicle and who further would be able to recover the vehicle immediately. Thus, for at least a substantial portion of the stolen vehicle owners, perhaps most of them, the additional procedure would be of no value.

Finally, this case involves all three of the factors listed in Fuentes as characteristics of the extraordinary circumstances under which pre-deprivation notice and hearing are not constitutionally necessary. The seizure here is directly necessary to secure an important public purpose, there is a need

for prompt action, and the seizures are initiated through municipal officials responsible for determining the necessity of the seizure pursuant to narrow legislative standards. See supra p. 192.

Consideration of the three-part Mathews inquiry demonstrates that this is an unusual situation where pre-deprivation notice and hearing are not required. Thus the securing of recently discovered stolen automobiles implements a number of important governmental and public interests. The additional safeguards would impose a substantial burden on the state in terms of redirecting use of law enforcement manpower to accommodate an individual owner's interests. The significant value of the additional safeguards is greatly re-

duced by the mere fact that many if not most of the affected individuals in practice will not be able to avail themselves of the proposed pre-two notice to collect their cars before they are towed. The important private interest affected by the defendants' actions in the use of one's vehicle is also significantly attenuated since the City is not the sole or even primary person responsible for the deprivation of property and indeed is responsible for ending any private party deprivation. In summary, the important government interests here would be greatly hindered by additional procedural safeguards of limited benefit in protecting an amorphous and elusive private interest. The fact that other cities may have instituted a phone notice system

similar to the one advocated by plaintiff, thus allowing owners of recovered stolen vehicles an opportunity to retrieve their own vehicles, is not dispositive here; while the institution of such procedures may be laudable, the Constitution does not require them.

Plaintiff appears to argue that cases requiring pre-tow notice and hearing with respect to abandoned cars are indistinguishable from the present situation and that the only basis for distinguishing our decision in Sutton (permitting a city to tow illegally parked vehicles without prior notice and hearing) from the abandoned car cases requiring pre-deprivation notice and hearing, see, e.g., Tedeschi, supra; Graff v. Nicholl, 370 F.Supp. 974 (N.D.Ill.

1973), is that the plaintiffs in Sutton had violated the law. Consequently, plaintiff argues that since he has violated no law, pre-tow notice must also be required here. Although it may be unfortunate that the defendants' procedures require vehicle owners to "ante up" to recover their stolen vehicles until reimbursed under standard insurance policies,[6] the plaintiff's argument must fail for two reasons. First, Sutton solely and expressly distinguished the abandoned car cases on

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[6]See Suggestion of Intervening Petitioners - Appellants Merit Insurance Company, Heritage Insurance Company, Prestige Casualty Company, Reliable Insurance Company, Delta Casualty Company and Coronet Insurance Company at p. 2. Their intervention was denied by the district court (R. Item 50).

the basis that prior notice was "infeasible in the case of an illegally parked car; the car will be gone by the time the owner is notified." 672 F.2d at 647. Second, not only is there the problem of infeasibility of pre-two notice as there was in Sutton, see supra p. 193, but as pointed out previously, there is a substantial basis for distinguishing abandoned cars from recently recovered stolen vehicles. See supra pp. 192-193. It is these differences that prompt today's de- cision.

IV

[3, 4] Plaintiff devotes a major portion of his brief to the argument that the defendants' procedures are invalid because the recovery of stolen vehicles is part of "the general work of the police

department" and a city may not charge individuals for such municipal services (Pltf. Br. 13-16). This assertion was presented below, but the district court did not rest its constitutional ruling on that argument (see 11/18/83 Order, R. Item 29). The gravamen of plaintiff's contention is that the class should not have to pay for towing and storage costs under any circumstances. He suggests institution of post-tow procedures whereby owners of recovered stolen vehicles could show they had violated no statute and could obtain a waiver of payment of towing and storage fees (Complaint ¶13, R Item 1; Memorandum in Support of Plaintiff's Cross Motion for Summary Judgment at 2 (R. ITem 19)). The claim is not stated in terms of due

process but the Fourteenth Amendment appears to be the only basis for such an attack. Statutes may of course be challenged on the basis that they are wholly arbitrary or irrational in purpose or means. See Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 82-84, 98 S.Ct. 2620, 2635-2636, 57 L.Ed.2d 595; Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980), certiorari de- nied, 454 U.S. 855, 102 S.Ct. 304, 70 L.Ed.2d 150; Rogin v. Bensalem Town- ship, 616 F.2d 680, 689 (3rd Cir. 1980), certiorari denied, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223. However, the towing and storage fees charged by defendants were authorized by Illinois law, ILL.REV.STAT. ch. 95-1/2, §4-203 (1983) ("When a vehi-

cle removal from either public or private property is authorized by a law enforcement agency, the owner of the vehicle will be responsible for all towing costs"), as well as by the Municipal Code of Chicago, Section 27-367, and Police Department General Order 75-5. This Court can discover nothing arbitrary or irrational about these provisions allowing the City to assess the cost of this particularized service directly against the recipient of the service. To the extent plaintiff's turn-of-the-century Illinois cases are relevant here, see Koy v. Chicago, 263 Ill. 122, 104 N.E. 1104 (1914); City of Chicago v. Weber, 246 Ill. 304, 92 N.E. 859 (1910); Village of Lemont v. Jenks, 197 Ill. 363, 64 N.E. 362 (1902), they are distinguishable in that the

City is not attempting to place "a purely public burden," Koy, 263 Ill. at 129, 104 N.E. at 1106, such as the cost of health inspectors or firefighters, upon individual citizens.

V

Because plaintiff appears to have limited his attack on the City's vehicle recovery procedures to their failure to provide pre-tow notice, apart from denying a vehicle owner's obligation to pay these charges at all, see supra p. 190, it would be improper for us to rule on the adequacy of the city's post-tow procedures of notice and hearing. The issue was not fully developed below. For example, it is not clear how much time expires between the initial tow

and the provision of a hearing under the existing procedures. See supra p. 192; Goichman, 682 F.2d at 1324 (forty-eight-hour delay in providing postdeprivation hearing sanctioned); Stypmann, 557 F.2d at 1344 (five-day delay invalid). The procedures do provide more than the "meaningless formality" suggested by the district court (11/18/83 Order at 11, R. Item 29) in that they allow the owner to contest whether the vehicle towed was in fact one that was and remained reported stolen. The fact that the police may rarely err in carrying out their duties vis-a-vis stolen cars is not a valid basis for terming a post-tow hearing meaningless. It is also noteworthy that the defendants provide owners of the stolen vehicles with an opportunity to obtain release

of the vehicle by making a deposit of $25, an amount less than the towing and storage charges, a procedure ruled constitutionally unnecessary by the Ninth Circuit. See Goichman, 682 F.2d at 1325.

In view of our holding that the City is not constitutionally required to give pre-tow notice nor prohibited from assessing towing costs upon individual vehicle owners, it is unnecessary to address plaintiff's and defendants' arguments concerning the composition of the plaintiff class mandated below and defendants' argument concerning the propriety of awarding retrospective reimbursement relief, also awarded below. The cause is reversed and remanded with instructions to enter summary judgment for the defendants.

APPENDIX C

Denial of Rehearing and

Rehearing En Banc

Entered November 18, 1986

JUDGMENT-ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
September 24, 1985
Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. EUGENE A. WRIGHT, Senior Circuit Judge[1]

COAD MILLER, Individually on behalf of himself and in a representative capacity on behalf of a class of persons similarly situated, Plaintiff-Appellee,
No. 84-2329 vs.
CITY OF CHICAGO, et al., Defendants-Appellees, AND MERIT INSURANCE COMPANY, et al., Intervening Petitioners-Appellants.

COAD MILLER, Individually on behalf of himself and in a representative capacity on behalf of a class of persons similarly situated, Plaintiff-Appellee,
No. 84-2614 vs.
CITY OF CHICAGO, et al., Defendnats-Appellants.

COAD MILLER, Individually on behalf of himself and in a representative

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[1]The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

capacity on behalf of a class of persons similarly situated, Plaintiff-Appellant,
No. 84-2640 vs.
CITY OF CHICAGO, a municipal corporation, and John Does One through Five, employees, agents and towing contractors, Defendants-Appellees.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and REMANDED, with instructions, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
November 18, 1985

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. EUGENE A. WRIGHT, Senior Circuit Judge[1]

COAD MILLER, Individually on behalf of himself and in a representative capacity on behalf of a class of persons similarly situated, Plaintiff-Appellee,

No. 84-2329
84-2614 vs.
84-2640

CITY OF CHICAGO, et al., Defendants-Appellees.

ORDER

On consideration of the petition for rehearing en banc filed on October 11, 1985, by Coad Miller, no judge in active service has requested a vote thereon, and all of the judges

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[1]The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

Chicago Municipal Code §27-367

Chicago Police Department
General Order 75-5

§27-367. Before the owner or person entitled to possession of any legally impounded vehicle shall be permitted to remove the same from the custody of the superintendent of police he shall furnish evidence of his identity and ownership of the vehicle and right of possession thereto, shall sign a receipt for the vehicle, and shall pay a fee of forty-five dollars for passenger vehicles of not more than seven passengers and sixty-seven dollars for trucks or commercial vehicles to cover the cost of towing or removal to a vehicle pound or authorized garage, and in addition thereto, the cost of storage five dollars per day for passenger vehicles of no more than 7 passengers, and ten dollars per day for trucks or commercial vehicles, or said owner or person entitled to possession may (1) without an immediate release of his vehicle request a hearing be held within twenty-four hours or (2) obtain an immediate release of his vehicle by requesting said hearing be held within seven days and by making a deposit of twenty-five dollars (forty dollars for trucks or commercial vehicles).

(a) The hearing referred to herein shall be conducted according to police regulations and shall determine the validity of the impounding of said vehicles and any towing or storage charges.

Chicago Police Department General Order 75-5

III. TERMS AND DEFINITIONS

A. Immediate Tows

Involves a vehicle which obstructs traffic, or presents a hazardous condition to the safety of the community, is needed for investigation, or has been involved in a hit and run accident, is stolen, is involved in a coroner's or public administrator' case, or is towed under Article 36, Chapter 38, IRS.

. . .

10. Stolen Vehicles

A vehicle that has been reported stolen and the vehicle's owner is not present at the location of recovery, or the vehicle is needed for investigation.

IV. PROCEDURES

A. Immediate Tows

Immediate tows are provided by city employed tow truck operators who are available twenty-four hours a day, seven days a week. To tow and impound vehicles properly classified as immediate tows, Department members will:

1. complete a Vehicle Tow Case Report (CPD-11.413) as fully as possible, recording cir-

cumstances which justify the request for a vehicle tow by a Department of Streets and Sanitation tow truck.

2. if the vehicle is operable:

a. a member of a two man car may drive the vehicle to his district of assignment, the district of arrest or other police facility, as appropriate, when the police situation dictates that the completion of the assignment will be facilitated by the relocation, of the vehicle prior to towing. Example: to simplify the inventory of evidence or recovered property or when the vehicle cannot be legally, safely and continuously parked in its present location prior to towing.

b. an officer assigned to a one-man car will request the dispatcher to assign the closest two man car to drive the vehicle to the appropriate police facility.

c. an officer may operate the vehicle to be towed, without the owner's consent, when the police situation dictates its relocation.

d. the vehicle will be parked and locked in the police facility parking lot, conditions permitting, or in close proximity to the facility. The vehicle will be located where it

can be legally, safety and continuously parked.

e. notify the Communcation Operations Section dispatcher that an immediate tow is needed, and:

(1) request a hot desk check.

(2) give the year, make, state license number and VIN.

(3) indicate whether the vehicle will roll.

(4) provide exact address of the tow.

(5) inform the dispatcher of the facility where the Vehicle Tow Case Report and the key(s) can be located.

f. the officer requesting the tow will leave the Vehicle Tow Case Report and vehicle key(s) with the desk officer at the district of arrest, or district of assignment. If the vehicle is driven to another police facility, the case report and key(s) will be left with the person in charge of that facility.

3. if a vehicle is inoperable:

a. notify the Communication Operations Section dispatcher that an immediate tow is needed, and:

(1) request a hot desk check.

(2) give the year, make, state license number and VIN.

(3) indicate the exact address of the tow.

(4) indicate whether the vehicle will roll (if either two front or back wheels are on and operative) or must be floated (towed on portable flotation axles).

b. place the original copy of the Vehicle Tow Case Report under the windshield wiper or, in inclement weather, on the automobile front set, if possible.

4. classify abandoned vehicles as hazardous - immediate tows only if there is a clear and present danger to the safety of the community, and with the approval of the supervisor sergeant.

5. remove and inventory personal property not within a locked glove compartment or locked trunk.

6. contact the Evidence and Recovered Property Section for technical assistance prior to the inventory of perishable goods.

7. cancel the request for an immediate tow if the arrestee is released on bail and the veh-

icle is not being held either for investigation or under Article 36.